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December 3, 2004

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Federal Communications Commission
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BY HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

RE: Florida Cable Telecommunications Association v. Gulf Power Company
EB Docket No. 04-381

Dear Ms. Dortch:

On behalf of Gulf Power Company, find enclosed for filing the original and six (6) copies of Gulf Power Company's Preliminary Statement on Alternative Cost Methodology for filing in the above-captioned proceeding. We have also included one (1) "Confirmation Copy" for you to mark with the Commission's date stamp and return to the individual delivering this filing.

If you have any questions or if there is anything further we need to do, please call me at the telephone number provided above.

Sincerely,

Jennifer M. Buettner //T.F.L.

Jennifer M. Buettner
Counsel for Gulf Power Company

Enclosures

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List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION; COX COMMUNICATIONS GULF COAST, LLC, et al.,	)	
Complainants,	)	E.B. Docket No. 04-381
v.	)	
GULF POWER COMPANY,	)	
Respondent.	)	

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

PRELIMINARY STATEMENT ON ALTERNATIVE COST METHODOLOGY

Respondent Gulf Power Company ("Gulf Power"), pursuant to the September 30, 2004 Prehearing Order (as amended by Order of October 20, 2004), submits the following Preliminary Statement on Alternative Cost Methodology:

Introduction

The alternative to the regulatory Cable Rate is Just Compensation. Just Compensation, by its very nature, is not a determination that can be quantified with mathematic precision. For the purposes of this proceeding, if Gulf Power meets the Eleventh Circuit's "test" it is entitled to something higher than the regulated Cable Rate. The Eleventh Circuit stated:

> [A] power company whose poles are not "full" can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation.

Alabama Power Co. v. FCC, 311 F.3d 1357, 1371 (11th Cir. 2002) ("APCo v. FCC"). This dichotomy between the "regulated rate" and "just compensation" is not accidental; the Cable Rate does not equal Just Compensation. On this point, utilities seem to have scored a rare pole attachment victory.

In the APCo v. FCC proceeding, however, the Eleventh Circuit did not allow a higher rate because it found Alabama Power had not alleged that its poles were crowded (elsewhere in the opinion described as "rivalrous"):

> This leads us to the important unknown fact: nowhere in the record did APCO allege that APCO's network of poles is currently crowded. It therefore had no claim.

APCo v. FCC, 311 F.3d at 1370. For this reason, the Eleventh Circuit rejected Alabama Power's as applied challenge to the Cable Rate.

This proceeding is not about the Cable Rate. However, Gulf Power expects that Complainants will argue that the Cable Rate is more than sufficient under any set of circumstances.[1] This argument is at odds with the dichotomy between the "regulated rate" and "just compensation" set forth in the APCo v. FCC decision. Gulf Power contends (and has contended since the 1996 Amendments to the Pole Attachment Act) that the Cable Rate is constitutionally insufficient under any set of circumstances.

Although there are numerous flaws in the Cable Rate, the two primary features that prevent it from being a means of Just Compensation are as follows: (1) the Cable Rate relies on a historical cost methodology as opposed to a current replacement cost methodology; and (2) the

[1] In the short life of this hearing proceeding, Complainants already have made this argument. See, e.g., pp. 12-13 of Complainants' Petition For Clarification.

Cable Rate fails to fully allocate the unusable space on a pole (which, as Congress has stated, is "of equal benefit to all entities attaching to the pole").[2]

The analysis in this proceeding should neither start nor finish with the Cable Rate. Instead, the focus should be on determining what amount Gulf Power is due as Just Compensation for the taking of its pole space. The starting point is Fair Market Value. Fair Market Value is "the price in cash at which the property would at that time change hands in a transaction between a willing buyer and a willing seller, neither acting under a compulsion to buy or sell." Iriarte v. United States, 57 F.2d 105, 110 (1st Cir. 1946) (citing United States v. Miller, 317 U.S. 276, 373 (1942)).

Without waiving any of its arguments, and reserving the right to later amend or alter the proposed cost methodologies, Gulf Power submits the following alternative cost methodologies for determining Fair Market Value and Just Compensation:

1. Sales Comparisons Approach;
2. Current Replacement Cost Approach;
3. Federal Concessions Leasing Model.

These approaches are not necessarily mutually exclusive.

Sales Comparisons Approach

A well-established and highly accurate indicator of Just Compensation is what others are paying for similar or identical property in the open market. As set forth in Gulf Power's January 9, 2004 Description of Evidence, multiple attachers pay in excess of $40 per pole annually for the identical one-foot of pole space that the Complainants attach to. Gulf Power's joint users (BellSouth, Sprint, and GTC) also pay far in excess of the Cable Rate, while at the same time

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[2] H.R. Rep. No. 104-204, at 92, 1996 U.S.C.C.A.N., at 58-59, H.R. Con. Rep. No. 104-459, at 206, 1996 U.S.C.C.A.N., at 220.

providing further consideration to Gulf Power in the form of shared liability, indemnity, and other joint-use privileges.

The Sales Comparison Approach is not formulaic. Gulf Power anticipates presenting expert appraisal testimony regarding the price a Sales Comparison Approach yields in terms of Fair Market Value. Gulf Power further expects that the number will fall somewhere between the amount paid by joint users and the amount paid by jurisdictional attachers who have freely negotiated with Gulf Power.[3]

Current Replacement Cost Approach

If the Sales Comparison Approach is deemed insufficient, standing alone, for determining Fair Market Value, the Current Replacement Cost Approach can help color the analysis. Current replacement costs are a far greater indicator of the present value of an asset than historical costs. For this reason, historical (or embedded) costs are disfavored as a means of determining just compensation. See United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403 (1949) ("original cost of the property, however, is generally rejected as a backward-looking measure that is unreliable in determining a current fair market value"). Gulf Power expects to present expert appraisal testimony supporting a simple current replacement cost formula, and substantiating the use of such formula. At a minimum, this formula will "right" the "wrongs" of the Cable Rate by using current replacement costs (as opposed to historical costs), and fully allocating the unusable pole space (in much the same way the Telecom Rate allocates unusable space).

[3] Though Gulf Power is not certain, at this point, what the dollar amounts will be, Gulf Power expects this number to fall in the $25 - $40 range. Complainants have criticized Gulf Power in the past for a comparatively limited number of sales comparisons. However, a comparatively limited number of sales comparisons cannot be held against Gulf Power since it is the government that has suppressed an open market for nearly 30 years.

Though Gulf Power is uncertain of the precise charge this formula will yield using the most current data, Gulf Power expects this methodology to yield a price in the $30 - $40 range.

Federal Concessions Leasing Model

As a potential alternative to the Sales Comparison Approach or the Current Replacement Cost Approach (or in addition to those approaches), Gulf Power proposes employing the government's own means of valuing unique property (for example, marina space on a government owned lake), which is based on a percentage of the concessioners' gross income. Cable companies, for their part, contend that they could not exist without access to utility poles See, e.g., Complainants' Reply, P.A. No. 00-004, August 29, 2000, pp. 24-25 (claiming that utility poles are "essential facilities").[4] Given Complainants' position, the Federal Concessions Leasing Model may be informative as an alternative cost methodology. Gulf Power does not know the gross income of complainants (or the gross income attributable to specific service areas). Nor does Gulf Power know, at this stage, the appropriate percentage of gross income to apply. Thus, Gulf Power cannot estimate at this time what figure this formula might yield. Gulf Power intends to seek information relevant to this approach during discovery, and to develop this methodology through expert appraisal testimony.

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[4] To be clear, Gulf Power does not agree that its pole network is an "essential facility."

Conclusion

This submission is not intended to be an exhaustive list of potential alternative cost methodologies. Gulf Power remains open to considering other methodologies, as long as they yield (or at least approximate) constitutionally adequate Just Compensation.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Preliminary Statement On Alternative Cost Methodology has been served upon the following by United States mail, on this the 3rd day of December, 2004:

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